

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1251-CR

Cir. Ct. No. 2006CF5568

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON LYDELL BRISCO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Marlon Lydell Brisco, *pro se*, appeals from an order denying his postconviction motion for DNA testing at State expense under WIS. STAT. § 974.07(7)(a)2. He contends the circuit court erroneously exercised

its discretion in denying his motion for DNA testing of items found at the crime scene. We affirm.

¶2 Brisco was charged with three counts of first-degree homicide, as a party to a crime, for the murders of victims of an armed robbery. Pursuant to a plea bargain, the charges were reduced to three counts of felony murder, as a party to a crime, with armed robbery as the predicate offense. After a no-merit appeal, Brisco filed a *pro se* postconviction motion for DNA testing under WIS. STAT. § 974.07(7)(a)2. The circuit court denied the motion.

¶3 Brisco contends that he is entitled to court-ordered DNA testing under WIS. STAT. § 974.07(7)(a)2. of all evidence collected in the case because he is innocent of the charges and the testing would show that he did not commit the crimes. A circuit court shall order DNA testing under § 974.07(7)(a)2. if the movant claims that he or she is innocent of the offense at issue and it is reasonably probable that the movant would not have been convicted had exculpatory DNA testing results been available before the conviction. *See* § 974.07(7)(a). We will uphold the circuit court's order denying a motion for DNA testing on the grounds that there is no reasonable probability that the movant would not have been convicted had the DNA evidence been available before conviction unless the circuit court misuses its discretion. *State v. Hudson*, 2004 WI App 99, ¶16, 273 Wis. 2d 707, 715, 681 N.W.2d 316, 320–321.

¶4 Even if we assume that DNA testing would yield the results that Brisco claims—that his DNA was not present on any of the evidence taken from the crime scene—it would not show that Brisco was not present during the murders or that he is innocent of the crimes. The State did not dispute Brisco's story that he served as a lookout, watched the crimes occur, but did not participate

directly in the violence against the victims. Given the manner in which Brisco participated in the crimes by his own admission, there is no reason to expect that Brisco's DNA would be found at the crime scene. Thus, the absence of DNA evidence linking Brisco to the crime is not exculpatory. Moreover, Brisco was aware that no DNA evidence had been found linking him to the scene on the items already tested for DNA at the time he accepted the plea bargain, but he nevertheless decided to accept the plea bargain, a choice consistent with his admission of indirect responsibility for the crimes. Brisco's choice in this regard is indicative of the fact that such evidence does not tend to show that he is not culpable. Beyond the fact that lack of DNA evidence at the scene would not tend to exonerate Brisco, DNA testing suggesting no connection between Brisco and the crime scene would also fail to undermine a key basis for conviction, Brisco's confession, with its details about the crime that would have been known only to someone who was present. Therefore, it is not reasonably probable that Brisco would not have been convicted had all of the evidence been tested for DNA prior to Brisco's plea.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

